STATE OF MICHIGAN

COURT OF APPEALS

TONY KITZNER,

Plaintiff-Appellant,

v

HOUGHTON FLUID CARE,

Defendant-Appellee

and

CITIZENS INSURANCE COMPANY, Subrogee of OMEGA INDUSTRIES, INC.,

Intervening Plaintiff.

UNPUBLISHED
January 18, 2007

No. 265148
Wayne Circuit Court
LC No. 03-317203-NO

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this product liability action, plaintiff appeals as of right an order granting judgment of no cause of action in favor of defendant. We affirm.

This case arose out of an accident that took place on June 12, 1999, at Omega Industries, where plaintiff was employed as a machine operator. Plaintiff's responsibilities were to operate a Makino A-77 computer-controlled milling machine that was exclusively used to machine a magnesium component that was cast by another company and ultimately intended to be used in a car. Magnesium requires a certain amount of careful handling: the metal itself can burn dangerously, and it reacts with water to produce hydrogen gas, which is itself combustible. Proper coolant was therefore essential to the machining job. Testimony indicated that any coolant used for magnesium machining would need to be water-based to ensure proper thermal conduction, but would also contain some percentage of emulsified oil, a primary purpose of which is to prevent or reduce the hydrogen-generating reaction between the magnesium and the water. On the day of the accident, Omega was utilizing a coolant called Magnesol, which was developed and produced by Bencyn, defendant's predecessor in interest. Omega had switched to Magnesol from a prior coolant in an attempt to cure a problem involving coolant lines clogging. Magnesol worked well for several months before developing an unexplained problem that resembled curdling. The accident itself was an explosion inside the Makino machine, producing a twelve-foot yellow-to-red colored fireball that blew plaintiff away from the machine and

burned him. After the explosion, Omega repaired the Makino, conducted additional magnesium-safety training, switched back to the original coolant, and eventually switched to a third coolant.

The factual gravamen of plaintiff's claim in this case is that the Magnesol "split" or "separated," causing the visual appearance of curdling, impeding the Makino's coolant filtration system, and permitting the magnesium debris produced by the machining process to produce hydrogen. The trial court concluded that plaintiff's express warranty claim was precluded by the disclaimers prominently affixed to the barrels of Magnesol delivered to Omega, so the trial court granted directed verdict to defendant on that claim. The trial court concluded that the remainder of plaintiff's claims were merely restatements of plaintiff's failure to warn claim. After a nine-day jury trial, the jury was given a special verdict form containing the following questions and to which the jury answered:

> 1. Was defendant negligent by failing to warn potential users of magnosol [sic] of the danger in using magnosol [sic]? Answer: YES
>
> 2. Was defendant's failure to warn a proximate cause of plaintiff's injuries? Answer: YES
>
> 3. Was plaintiff's employer Omega a sophisticated user? Answer: YES
>
> 4. Was defendant negligent in one or more of the other ways claimed by plaintiff? Answer: YES
>
> 5. Was defendant's negligence a proximate cause of plaintiff's injuries? Answer: YES
>
> 6. Did defendant breach an implied warranty? Answer: NO
>
> 7. Was defendant's breach of an implied warranty a proximate cause of plaintiff's injuries? Answer: NO ANSWER
>
> 8. Was Omega Industries negligent in one or more of the ways claimed by defendant. Answer: YES
>
> 9. Was Omega's negligence a proximate cause of plaintiff's injuries? Answer: YES
>
> 10. Was there a practical and technically feasible alternative product available that would have prevented the harm posed by magnosol [sic] that would not have significantly impaired the usefulness or desirability of the product? Answer: YES
>
> 11. Was plaintiff a sophisticated user? Answer: NO
>
> 12a. Was the injury in this case caused by an inherent characteristic of the product that could not be eliminated without substantially compromising the product's use or desirability? Answer: YES

> 12b. If your answer to 12a is yes, was that recognized by persons with the ordinary knowledge common to the industry community? Answer: YES
>
> 13. Using 100% as the total, enter the percentage of negligence attributable to the defendant and to Omega. Answer: DEFENDANT 70%, OMEGA 30%

The trial court held oral argument on the ramifications of the jury's findings, and it granted defendant's judgment of no cause of action on the ground that the sophisticated user defense precluded plaintiff's failure to warn claim. Plaintiff appeals from that order.

Questions of law are reviewed de novo. *Wold Architects and Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006). We defer to the jury's role and opportunity to judge facts, and the jury's findings may be overturned only where the great weight of the evidence is manifestly against those findings. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). A trial court's findings of fact are reviewed for clear error. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005). A trial court's decision whether to grant a motion for directed verdict is reviewed de novo, considering all evidence and reasonable inferences in the light most favorable to the nonmoving party and granting the motion only if reasonable minds could not perceive the existence of a genuine factual question. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Plaintiff first argues that the "sophisticated user defense" should not apply because he, personally, was clearly not a sophisticated user. We disagree.

The "sophisticated user defense" is set forth by statute. Pursuant to MCL 600.2947(4):

> Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

And pursuant to MCL 600.2945(j):

> "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

Presuming Magnesol was defective or dangerous, defendant would only be required to warn a user like plaintiff if defendant had no reason to believe plaintiff would realize the danger *and* defendant could not reasonably rely on Omega, the purchaser, to warn plaintiff of any dangers. *Jodway v Kennametal, Inc*, 207 Mich App 622, 627; 525 NW2d 883 (1994). It is "well settled" that if the purchaser is a sophisticated user, the manufacturer is entitled to rely on the purchaser to communicate to the user any dangers. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 18-19; 596 NW2d 620 (1999).

Plaintiff therefore also contends that Omega should not be considered a sophisticated user because Omega relied on defendant for all of its information about Magnesol. The jury found Omega a sophisticated user, but plaintiff contends that the trial court should have granted directed verdict on this issue and refrained from submitting the question to the jury. We disagree.

Commercial users of bulk materials must generally be regarded as "sophisticated users" as a matter of law, subject only to analyzing whether the manufacturer's dissemination of information was reasonable under the circumstances. *Bock v General Motors Corp*, 247 Mich App 705, 714; 637 NW2d 825 (2001). Omega was clearly a commercial bulk user of Magnesol, and had been a commercial bulk user of other coolants, and of magnesium, for several years. Omega's president had a bachelor's degree in science and chemistry, he had specifically researched magnesium, and he made informed decisions whether to use certain safety devices with the magnesium machining operation. Expert testimony indicated that magnesium's properties were "basic high school chemistry" and should be expected to be known by everyone in the field. Defendant's president at the time was particularly impressed with Omega's president. Although Omega was not specifically familiar with Magnesol, it was clearly familiar with magnesium and magnesium coolants in general, including their proper handling, maintenance, and inherent dangers. There is no indication that defendant acted unreasonably in presuming that Omega was knowledgeable in how to use a magnesium coolant safely. It is worth emphasizing that plaintiff contends that the trial court erred in failing to grant its motion for directed verdict, which would require that reasonable minds could not find a question of fact. Given Omega's apparent level of knowledge and defendant's apparent awareness thereof, the trial court correctly found, at a minimum, a question of fact for the jury whether Omega was a sophisticated user.

We will not disturb the jury's finding that Omega was a sophisticated user, and we therefore agree with the trial court that plaintiff's personal level of sophistication is not relevant. The trial court properly granted a judgment of no cause of action against plaintiff's failure to warn claim on the basis of the sophisticated user defense.

Plaintiff next contends that the trial court erred in merging all of his claims, other than his express warranty claim, into a failure to warn claim. We disagree.

We agree with the trial court that plaintiff's alternative theories are no more than rephrasings of the same underlying assertion: that, in some manner, defendant did not communicate to plaintiff the fact that it was not safe for Omega to use Magnesol to machine magnesium in the Makino A-77 machine at Omega's machine shop. "When a party brings a motion for summary disposition, courts 'look beyond the face of a plaintiff's pleadings to determine the gravamen or gist of the cause of action contained in the complaint.'" *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 159; 677 NW2d 874 (2003), quoting *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 476; 409 NW2d 213 (1987). The same principle applies here, where again a court must first determine what cause of action is being alleged in order to determine what legal principles to apply thereto. See also, *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005) ("regardless of plaintiff's word choice, the gravamen of plaintiff's complaint remains a cause of action for lost opportunity to survive brought on the basis of defendant's alleged medical malpractice"). However plaintiff wishes to phrase his

allegations, the underlying claim is one of failure to warn, which is subject to the sophisticated user defense.[1]

Plaintiff argues that defendant had actual knowledge that the Magnesol was defective and likely to cause the injury that resulted in this action, thereby depriving defendant of the sophisticated user defense under MCL 600.2949(A). That section was repealed by 1995 PA 249, effective March 28, 1996, which predates the accident in this case by more than three years and predates the first contact between Omega and defendant by more than two years. Therefore, MCL 600.2949 was not in effect at any time relevant to this case and is of no consequence here.

Plaintiff argues that the trial court erred in granting directed verdict to defendant on plaintiff's express warranty claim. We disagree.

The gravamen of plaintiff's express warranty claim is that defendant's representative, explicitly told Omega's owner that Magnesol would be safe to use in Omega's magnesium-machining operation. The gravamen of plaintiff's failure to warn claim is that defendant failed to advise Omega that Magnesol would *not* be safe to use in Omega's magnesium-machining operation. Therefore, plaintiff's express warranty claim is again essentially no more than another restatement of his failure to warn claim: that defendant either did not tell Omega that Magnesol would produce hydrogen or did tell Omega that it would not.

In any event, "[a]n express warranty is created by a seller by setting forth a promise or affirmation, description, or sample with the intent that the goods will conform." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 42; 550 NW2d 809 (1996). Plaintiff specifically contends that defendant warranted three things: that Magnesol would not produce hydrogen when used to machine magnesium, that it was safe to use for machining magnesium, and that it was appropriate to use for machining magnesium. We have been provided with nothing in writing purporting to be an expression by defendant that Magnesol would not produce hydrogen, so we will not infer such a statement. See *Scott, supra* at 43. The Technical Data Sheet and the Material Safety Data Sheet, when viewed together, as they were apparently presented, indicate that Magnesol is "safe" in the sense of having low toxicity and few special handling requirements. It is clear that Magnesol, both by implication and by express statement in the Technical Data Sheet, is intended for use in machining magnesium, so any statement to that effect, without more, could be no more than a general affirmation of the value of the product. See *Carpenter v Alberto Culver Co*, 28 Mich App 399, 402-403; 184 NW2d 547 (1970). The literature does indicate that Magnesol would form a "stable" emulsion. However, the evidence was that coolants needed to be maintained according to manufacturers' specifications and regularly checked or they could become ineffective. The regular maintenance and checks performed by Omega shows that Omega did not in fact act as if Magnesol could be relied on to remain stable under any conditions whatsoever or without intense and regular maintenance. To

[1] Furthermore, under the common-law predecessor to the current statutory implementation of the "sophisticated user defense," our Supreme Court explained that "[l]iability may not be avoided or imposed by skillful manipulation of labels such as instructions or warnings." *Antcliff v State Employees Credit Union*, 414 Mich 624, 630; 327 NW2d 814 (1982).

the extent the technical documents' description of Magnesol as "stable" could be construed as a blanket guarantee that Magnesol would (or could) never destabilize, Omega clearly did not rely on it.

Any oral statements made by defendant to Omega are subject to the UCC statute of frauds, and they are therefore excluded to the extent they are inconsistent with the parties' written expressions. MCL 440.2202. The evidence further showed that Magnesol was delivered with an express disclaimer of any warranty. Plaintiff makes no argument that the disclaimer is "unreasonable," MCL 440.2316(1), nor do we perceive it as unreasonable. Therefore, "express language disclaiming any warranty" warrants "summary disposition of plaintiff's express warranty claim." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 314; 696 NW2d 49 (2005). The trial court appropriately granted directed verdict in defendant's favor as to the express warranty claim.

Because of our resolution of the above issues, it is unnecessary for us to address plaintiff's remaining issues on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis